

ISSUE SUMMARY:

Eastern MA stormwater petitions: EPA needs to respond to three petitions from environmental groups asking the agency to find that a wide range of commercial, industrial, institutional, and multi-family residential properties in the **Charles, Mystic, and Neponset River watersheds** are contributing to water quality problems in those rivers and should be required to obtain Clean Water Act (CWA) National Pollutant Discharge Elimination System (NPDES) permits for their storm water discharges. Such discharges are not currently covered by existing stormwater permits, but EPA could designate such sources as needing permits using the CWA's residual designation authority (RDA). See CWA § 402(p)(2)(E); 40 C.F.R. § 122.26.

UPCOMING MILESTONES:

Charles River Petition Response Process

October-November 2020: continuing stakeholder webinars, focus groups, technical analyses

December 2020: assess findings; draft staff recommendation

January 2021: Make recommendation to senior managers on residual designation and respond to the petition

Mystic and Neponset Rivers Petition Response Process

By Nov. 24, 2020: acknowledge receipt of petitions.

December 2020: meet with petitioners to discuss potential stakeholder process, similar to the process Region 1 is employing to respond to the Charles River RDA petition.

January 2021 – spring/summer 2021: start stakeholder meetings and conduct technical analyses.

BACKGROUND:

EPA Region 1 must act on three residual designation petitions. EPA is engaging in stakeholder processes and technical analyses to inform eventual decisions.

Charles River Watershed Petition

May 9, 2019, petition from the Conservation Law Foundation (CLF) and the Charles River Watershed Association (CRWA) asking EPA to exercise RDA to regulate certain stormwater discharges from privately-owned commercial, institutional, industrial, and multi-family residential properties of one acre or more in the Charles River watershed. The petition alleges that these discharges – not currently covered by a NPDES permit – are contributing to phosphorus water quality violations in the Charles River.

Neponset and Mystic River Watersheds

August 24, 2020, petitions from CLF asking EPA to exercise RDA to regulate certain stormwater discharges from commercial, institutional, industrial, and multi-family residential properties of one acre or more in the Mystic and Neponset River watersheds (both of which empty into Boston Harbor). The petition alleges that these discharges –not currently covered by a NPDES permit-- contribute to pathogen water quality violations in the Mystic and Neponset Rivers.

Steps toward Determinations

EPA has several separate steps once it receives an RDA Petition. First, EPA must respond to the petition, either denying it, granting it, or granting in part/denying in part. EPA must then make the “designation” (i.e., designate which sources need NPDES permit coverage). EPA would then develop individual and/or general permits, propose them for public comment, and take final action on the permits.

During summer 2020, Region 1 worked with the neutral Consensus Building Institute to develop a stakeholder outreach plan to respond to these RDA Petitions. In September 2020, Region 1 hosted three webinars for stakeholders: municipalities, commercial/industrial/institutional stakeholders, and environmental stakeholders. EPA will have further focus groups/information finding sessions with those stakeholders this fall. Additionally, Region 1 has been analyzing GIS

data for the watershed and assessing the kinds of discharges that are not currently regulated that may need permits. Region 1 will notify the petitioners of the designation determination once it is made. The decision will determine any additional work by the Region, which could include permit development.

Use of RDA has been limited and thoughtful messaging must accompany any associated permitting activity. Region 1 works closely with the HQ Office of Water and Office of General Counsel on these matters.

Legal Background on RDA

The Clean Water Act gives EPA authority to require NPDES permits for certain kinds of stormwater discharges, including stormwater from certain construction sites, municipal stormwater, and industrial stormwater. EPA's stormwater regulations then detail the different permitting requirements for all those categories. Other kinds of sites that discharge stormwater that are not automatically covered by those permitting categories might nonetheless need to be permitted.

- CWA § 402(p)(2)(E) provides that the Administrator or State may require a NPDES permit for a stormwater discharge where he/it determines that the discharge "contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States."
- EPA's regulations provide that the permitting authority may require permits where it determines that "storm water controls are needed for the discharge based on wasteload allocations that are part of total maximum daily loads (TMDLs) that address the pollutants of concern," or "that the discharge or category of discharges within a geographic area, contributes to a violation of a water quality standard or is significant contributor of pollutants to waters of the United States." 40 CFR § 122.26(a)(9)(i)(C) and (D).
- This authority, referred to as residual designation authority or "RDA," can be initiated by EPA or the state, or in response to a petition to designate in a specific instance (40 CFR § 122.26(f)(2)).
- The regulations require the agency to "issue a final determination" on any petition within 90 days after receiving the petition. 40 CFR § 122.26(f)(5).

Charles River Background

- The Commonwealth of Massachusetts, local communities, and EPA have invested considerable resources to restore water quality in the Charles River over the past three decades. Advances in stormwater management and the near-elimination of combined sewer overflows have yielded dramatic improvements, but phosphorus-driven algae blooms are the river's most important remaining water quality challenge. Toxic cyanobacteria blooms occur most summers; these blooms are highly visible and interfere with recreation in this heavily-used river.
- Phosphorus TMDLs in 2007 (Lower Charles) and 2011 (Upper/Middle Charles) identified stormwater as the primary source of phosphorus in the river and set wasteload allocations for various categories of stormwater sources, including the categories identified by the RDA petition.
- In 2008, based on water quality impairment data, EPA issued a preliminary residual designation for sites within the three uppermost towns in the Charles River watershed. EPA never finalized this designation because Region 1 ultimately decided that reissuance of the MA small municipal separate storm sewer system (MS4) general permit—which includes phosphorus reduction requirements for municipalities—was a higher priority. EPA intended to reconsider residual designation once implementation of the MS4 permit was underway. EPA planned to evaluate whether residual designation was needed to help MS4 permittees achieve their own phosphorus reduction requirements.
- EPA issued the MA MS4 permit in 2016 and the permit took effect on July 1, 2018. The permit covers municipal stormwater discharges in urbanized areas in Massachusetts as defined by the US Census.
- All 35 communities in the Charles River Watershed currently have MS4 permit coverage.
- The permit does not specify how permittees should regulate stormwater from private properties that discharge into their systems, but rather provides an overall TMDL-driven reduction requirement based on land use within the Urbanized Area for each MS4 community.

Mystic and Neponset Rivers

- Both rivers are subject to TMDLs for pathogens/bacteria. The TMDLs identified most of the bacteria sources in the watershed as stormwater related, as the stormwater picks up pollutants such as garbage, pet waste, and wildlife waste and deposits them into the rivers.
- In the coming months, Region 1 will assess available data on commercial, industrial, institutional, and multifamily residential properties in each watershed.

KEY EXTERNAL STAKEHOLDERS:

☒ Congress ☒ Industry ☒ States ☐ Tribes ☐ Media ☐ Other Federal
Agency ☒ NGO ☒ Local Governments ☐ Other (name of stakeholder)

MOVING FORWARD:

In January 2021, Region 1 staff expect to make a recommendation to management on whether to make a residual designation determination for the **Charles River**. EPA could determine that RD is not warranted (i.e., deny the petition); that RD is warranted exactly as described in the petition (i.e., grant the petition in full and permit all properties one acre or greater); or that the scientific record indicates that RD is warranted on a smaller scope than what the petition requested (i.e., could determine that a parcel size greater than one acre is appropriate). If EPA decides to exercise its RDA, EPA would then move into permit development.

Region 1 staff plan to begin discussing the **Neponset and Mystic River** watershed petitions with the petitioner in November-December 2020 and may conduct stakeholder outreach and technical analyses that are similar to those being conducted for the Charles River.

LEAD OFFICE/REGION: REGION 1

OTHER KEY OFFICES/REGIONS: OW/OGC